

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

STACEY LAIB,	)	
	)	No. CV-09-0142-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner	)	MOTION FOR SUMMARY JUDGMENT
of Social Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 12, 18.) Attorney Clifford King B'Hymer represents Stacey Laib (Plaintiff); Special Assistant United States Attorney Lisa Goldoftas represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

**JURISDICTION**

Plaintiff filed for disability insurance benefits (DIB) on February 26, 2006 (Tr. 124), and supplemental security income (SSI) on March 9, 2006. (Tr. 321.) She alleged disability due to "[left] shoulder dislocation, tendon tears, osteoperic [sic] range 2.39." (Tr. 115.) Her alleged onset date was January 16, 2006. (Tr. 123, 321.) Plaintiff's claim was denied initially and on reconsideration.

1 She requested a hearing before an administrative law judge (ALJ),  
2 which was held on September 23, 2008, before ALJ Paul Gaughen. (Tr.  
3 329-87.) Plaintiff, who was represented by counsel, medical expert  
4 Michael Gurvey, M.D., and vocational expert Daniel McKinney (VE)  
5 testified. (*Id.*) The ALJ denied benefits on February 13, 2009. (Tr.  
6 12-20, 9-11.) In her request for review by the Appeals Council,  
7 Plaintiff asserted the ALJ should have found her disabled for the  
8 closed period between January 16, 2006, through October 16, 2008.  
9 (Ct. Rec. 13 at 8-9.) The Appeals Council denied review. (Tr. 4-  
10 6.) The instant matter is before this court pursuant to 42 U.S.C.  
11 § 405(g).

#### 12 **STATEMENT OF THE CASE**

13 The facts of the case are set forth in detail in the transcript  
14 of proceedings and are briefly summarized here. Plaintiff was 42  
15 years old at the time of the hearing. (Tr. 302.) She had a high  
16 school diploma and three years of community college. (Tr. 120.)  
17 She was married at the time of application for benefits. (Tr. 321.)  
18 Plaintiff has past work experience as a certified nursing assistant,  
19 fish hatchery marker, and x-ray technician. (Tr. 116.) She had  
20 five surgeries on her left shoulder and upper left extremities  
21 between January 2006 and March 2008. (Tr. 334-336.) She also had  
22 injuries to her right shoulder, right hip and both knees. (Tr. 15.)  
23 She stated she could no longer work because of lack of mobility in  
24 her arm and shoulder; neck and shoulder pain; and headaches. (Tr.  
25 336.)

#### 26 **ADMINISTRATIVE DECISION**

27 Initially, ALJ Gaughen found Plaintiff was insured for DIB  
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1 purposes through June 30, 2009. (Tr. 14.) At step one of the  
2 sequential evaluation process, he found she had not engaged in  
3 substantial gainful activity since January 16, 2006, the alleged  
4 onset date. (*Id.*) At steps two and three, he found Plaintiff had  
5 "severe musculoskeletal impairment to the left shoulder/status-post  
6 arthroscopic surgery; and osteopenia with moderate risk for  
7 fracture," but alone and in combination, these impairments did not  
8 meet or medically equal one of the listed impairments in 20 C.F.R.,  
9 Pt. 404, Subpt. P, Appendix 1 (Listings). (*Id.*, Tr. 17.) At step  
10 four, the ALJ determined Plaintiff had the residual functional  
11 capacity (RFC) to perform a limited range of light work and a wide  
12 range of sedentary work with the following restrictions:

13 [S]he can occasionally lift 50 pounds and frequently lift  
14 10 pounds but only below the shoulder; she can sit and  
15 stand/walk 6 hours out of 8 hours, with the  
16 accommodation/option to sit-stand; and she can  
17 occasionally crawl. She cannot perform repetitive  
18 overhead work activities on the left and only below  
19 shoulder lifting of 10-15 pounds with the left extremity;  
20 and no unprotected heights (ladders, ropes, scaffolding);  
21 no heavy torque tasks with the left non-dominant  
22 hand/arm/wrists; and no vibrations.

19 (Tr. 16.) Considering this RFC and VE testimony, the ALJ found  
20 Plaintiff was not able to perform her past relevant work. (Tr. 18.)  
21 At step five, the ALJ found Plaintiff could perform light  
22 occupations such as cashier and messenger with the RFC assessed.  
23 (Tr. 19.) He concluded Plaintiff was not under a "disability" as  
24 defined by the Social Security Act at any time from January 16,  
25 2006, through the date of his decision. (*Id.*)

#### 26 STANDARD OF REVIEW

27 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
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1 court set out the standard of review:

2 A district court's order upholding the Commissioner's  
3 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
4 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
5 Commissioner may be reversed only if it is not supported  
6 by substantial evidence or if it is based on legal error.  
7 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
8 Substantial evidence is defined as being more than a mere  
9 scintilla, but less than a preponderance. *Id.* at 1098.  
10 Put another way, substantial evidence is such relevant  
11 evidence as a reasonable mind might accept as adequate to  
12 support a conclusion. *Richardson v. Perales*, 402 U.S.  
13 389, 401 (1971). If the evidence is susceptible to more  
14 than one rational interpretation, the court may not  
15 substitute its judgment for that of the Commissioner.  
16 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
17 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

18 The ALJ is responsible for determining credibility, resolving  
19 conflicts in medical testimony, and resolving ambiguities. *Andrews*  
20 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's  
21 determinations of law are reviewed *de novo*, although deference is  
22 owed to a reasonable construction of the applicable statutes.  
23 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 24 SEQUENTIAL PROCESS

25 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
26 requirements necessary to establish disability:

27 Under the Social Security Act, individuals who are  
28 "under a disability" are eligible to receive benefits. 42  
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
medically determinable physical or mental impairment"  
which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
from "anatomical, physiological, or psychological  
abnormalities which are demonstrable by medically  
acceptable clinical and laboratory diagnostic techniques."  
42 U.S.C. § 423(d)(3). The Act also provides that a  
claimant will be eligible for benefits only if his  
impairments "are of such severity that he is not only  
unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other

1 kind of substantial gainful work which exists in the  
2 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
3 the definition of disability consists of both medical and  
4 vocational components.

5 In evaluating whether a claimant suffers from a  
6 disability, an ALJ must apply a five-step sequential  
7 inquiry addressing both components of the definition,  
8 until a question is answered affirmatively or negatively  
9 in such a way that an ultimate determination can be made.  
10 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
11 claimant bears the burden of proving that [s]he is  
12 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
13 1999). This requires the presentation of "complete and  
14 detailed objective medical reports of h[is] condition from  
15 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
16 404.1512(a)-(b), 404.1513(d)).

17 It is the role of the trier of fact, not this court, to resolve  
18 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
19 supports more than one rational interpretation, the court may not  
20 substitute its judgment for that of the Commissioner. *Tackett*, 180  
21 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
22 Nevertheless, a decision supported by substantial evidence will  
23 still be set aside if the proper legal standards were not applied in  
24 weighing the evidence and making the decision. *Browner v. Secretary*  
25 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
26 there is substantial evidence to support the administrative  
27 findings, or if there is conflicting evidence that will support a  
28 finding of either disability or non-disability, the finding of the  
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
1230 (9<sup>th</sup> Cir. 1987).

#### 24 ISSUES

25 The question on review is whether the ALJ's decision is  
26 supported by substantial evidence and free of legal error. The sole  
27 issue raised by Plaintiff is whether the ALJ erred when he failed to  
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1 find her disabled for the closed period between January 16, 2006,  
2 and October 2008. (Ct. Rec. 13.)

3 **DISCUSSION**

4 Plaintiff alleged an onset date of January 16, 2006, in her  
5 initial application. The ALJ found she was not disabled at any time  
6 from that date through the date of his decision. It was not until  
7 Plaintiff requested review by the Appeals Council that a closed  
8 period of disability was asserted. However, the Appeals Council  
9 denied review, making the ALJ's non-disability determination a final  
10 decision. Plaintiff argues the ALJ should have found she was unable  
11 to perform work activities from the alleged date of onset to October  
12 2008, because she was recuperating from a series of orthopedic  
13 surgeries during that time.

14 Under the standards relevant to the Commissioner's final  
15 decision, a reviewing court will affirm the Commissioner's decision  
16 unless (1) it is not supported by substantial evidence, or (2) it is  
17 based on legal error. Even if there are two rational interpretations  
18 of the evidence, the court may not substitute its judgment for that  
19 of the Commissioner. Thus, even if Plaintiff identifies evidence in  
20 the record that reasonably supports her argument that she was  
21 disabled for a closed period, the standard of review dictates that  
22 the Commissioner's decision be upheld if it is legally sufficient.

23 Here, the ALJ's decision is supported by substantial evidence.  
24 In addition to medical records submitted by Plaintiff, the ALJ  
25 properly obtained medical expert testimony to assist in interpreting  
26 the medical records and ordered a consultative orthopedic evaluation  
27 to supplement the record. *Lester v. Chater*, 81 F.3d 821, 831 (9<sup>th</sup>  
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1 Cir. 1995). As the record shows, Plaintiff suffered numerous  
2 injuries and/or surgeries during the alleged closed period: left  
3 shoulder and biceps tenodesis repair surgery in June 2006 (Tr. 235-  
4 37); right humeral spiral fracture in November 2006 for which she  
5 was placed in a "long-arm hanging cast" (Tr. 139-40, 260-62); and  
6 left wrist fracture and ulnar injury surgery in March and April  
7 2007. (Tr. 128-33, 145-53.)

8 There are no medical records to establish ongoing impairment or  
9 treatment in September 2006 through October 2006, or from May 2007  
10 through December 2007. In December 2007, six months after  
11 Plaintiff's left wrist surgery, treating physician Steven Boyea,  
12 M.D., observed the Plaintiff was healing well, was able to make a  
13 full fist, "has good capillary refill and responds to light touch.  
14 Her fingers have full range of motion." (Tr. 142.) He noted that  
15 although she was improving, she reported a fair amount of discomfort  
16 and stiffness which was possibly early "post-traumatic arthrosis."  
17 (Tr. 143.) He recommended "anti-inflammatory medication and work  
18 and activity modification" to address possible arthrosis. (*Id.*)  
19 Between January 2008 and October 2008, there are no medical records  
20 indicating that Plaintiff's impairments or symptoms persisted.

21 The medical evidence was reviewed and discussed thoroughly by  
22 Dr. Gurvey, orthopedic surgeon and neuromuscular disease specialist,  
23 at the hearing. (Tr. 362-68, 373-76.) Plaintiff's attorney had the  
24 opportunity to cross-examine Dr. Gurvey, who clearly identified the  
25 five surgeries documented. (Tr. 363-66; 373-375.) As explained by  
26 Dr. Gurvey, although Plaintiff had shoulder surgery and a series of  
27 accidents and injuries between June 2006 and December 2007, there  
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1 are no medical reports to establish that alone or in combination,  
2 Plaintiff's impairments resulted in an inability to perform basic  
3 work activities for twelve continuous months. (*Id.*) As suggested  
4 by Dr. Gurvey and Plaintiff's counsel, a follow up consultative  
5 orthopedic exam was ordered to assess her functional capacity. (Tr.  
6 384.) The results were submitted to the ALJ in November 2008, and  
7 incorporated into his decision. (Tr. 302-313, 15.) Plaintiff does  
8 not reference evidence to contradict the medical findings, and does  
9 not challenge the medical source opinions in the record or Dr.  
10 Gurvey's testimony. It is significant that, as found by the ALJ,  
11 none of Plaintiff's treating or examining physicians opined she was  
12 unable to do any work activities during the relevant period. (Tr.  
13 18, 142-43.)

14       Regarding Plaintiff's testimony that her limitations were  
15 disabling, disability cannot be established based on a claimant's  
16 statements alone. 20 C.F.R. §§ 404.1508, 416.908; *Taylor v.*  
17 *Heckler*, 765 F.2d 872, 876 (9<sup>th</sup> Cir. 1985). Further, the ALJ found  
18 Plaintiff's testimony regarding the severity and persistence of her  
19 symptoms was not credible. To reject a claimant's subjective  
20 complaints, the ALJ must provide "specific, cogent reasons for the  
21 disbelief." *Morgan*, 169 F.3d at 599 (quoting *Rashad v. Sullivan*, 903  
22 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990)). If there is no affirmative  
23 evidence of malingering, the reasons must be "clear and convincing."  
24 *Lester*, 81 F.3d at 834. Here, the ALJ's credibility findings are  
25 supported by "clear and convincing reasons" and are not challenged.  
26 In rejecting Plaintiff's allegations to the extent they were  
27 inconsistent with the RFC for light work assessed, the ALJ properly  
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1 referenced inconsistencies between Plaintiff's hearing testimony and  
2 self-report in clinic notes, inconsistencies between her allegations  
3 and the medical source reports, and inconsistencies between  
4 limitations she alleged at the hearing and her report of activities  
5 of daily living in her application for benefits. (Tr. 17-18, see  
6 also Tr. 115, 142, 367.) He also noted that Plaintiff complained of  
7 symptoms, including on-going pain and numbness in her fingers, at  
8 the hearing that were not mentioned in the medical records. (Tr.  
9 17-18, 367, 374-75.)

10 The ALJ's evaluation of the evidence and findings are supported  
11 by substantial evidence and free of legal error. Where, as here,  
12 the Commissioner's determination of non-disability is a reasonable  
13 interpretation of the evidence, it must be affirmed. Because the  
14 ALJ found Plaintiff was not disabled at any time, *i.e.*, for a  
15 continuous period of twelve months, between January 2006 and  
16 February 2009, Plaintiff's argument that she is eligible for  
17 disability benefits for a closed period between January 2006 and  
18 October 2008 fails.

#### 19 CONCLUSION

20 The ALJ's determination is a rational interpretation of the  
21 record in its entirety and is supported by substantial evidence.  
22 Accordingly,

#### 23 IT IS ORDERED:

- 24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is  
25 **DENIED**;
- 26 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is  
27 **GRANTED**.

1 The District Court Executive is directed to file this Order and  
2 provide a copy to counsel for Plaintiff and Defendant. Judgment  
3 shall be entered for Defendant and the file closed.

4 DATED May 26, 2010.

5  
6 S/ CYNTHIA IMBROGNO  
7 UNITED STATES MAGISTRATE JUDGE  
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